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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 651

MELDON MITCHELL,
Petitioner,

against

THE FLINTKOTE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

Opinion Below

The opinion of the Court of Appeals is reported at 185 F. (2d) 1008. The District Court did not render an opinion.

II.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

III.

Statute and Executive Order Involved

The only Executive Order involved in this case is Executive Order 9001 (6 Fed. Reg. 6787) which was

promulgated pursuant to Title II of the First War Powers Act (55 Stat. 839, 50 U. S. C., App. § 611). Executive Order 9001 is no longer in effect.

IV.

Counter-statement of the Case

Petitioner's "Statement" (Petition, pp. 3-8) requires material correction and enlargement.

The District Judge charged the jury, without exception by petitioner, with respect to petitioner's claim as follows (R. 250):

> "As I understand the plaintiff, he says his version of this contract that he alleges was made on January 5, 1942 by telephone with Mr. Neher is that he was to be paid 3 per cent on the sales of any camouflage material sold by the defendant to the United States Government or any branch of it—the Army, Navy, or the Civilian Defense Department; that in consideration of that promise of reimbursement by the defendant he agreed to devote so much of his time as he thought it deserved to the finding out of the Government's wants in the camouflage field and promoting the defendant's reputation, which, it appears, boiled down to having its name added to the list of possible contractors."

The jury must therefore have found by its verdict that the contract between petitioner and respondent was entered into in the terms charged by the District Judge.

The only product which respondent sold to the United States Government for camouflage purposes was bituminous emulsion camouflage paint (P. Ex. 15, R. 278-282; R. 220). This paint is not an ordinary commercial paint

(R. 87). Its distinguishing features are that it is made from a cheap and readily available base material—asphalt—and is applicable to a wide variety of surfaces (R. 197).

Petitioner knew nothing about this product, and never discussed it with respondent's officials (R. 151). Petitioner never had a sample of this paint in his possession (R. 108); he never submitted any paint formulae to respondent (R. 108), and he never made any tests of respondent's product (R. 110). Petitioner did not draft any specifications relating to this paint (R. 110), and indeed he never read a specification that related to this product (R. 146-47).

All of the paint for camouflage purposes which respondent sold to the United States Government was sold to the War and Navy Departments (P. Ex. 15, R. 278-282). All the details in connection with such competitive bidding were handled by respondent's regular salesmen, who, in each case, prepared and submitted the bids (R. 215-16, 235-36).

Petitioner is not a salesman, even for his own business organization (R. 103). Petitioner's business is that of an artist for advertising materials (R. 21-25).

Petitioner never had office space in respondent's offices (R. 104). He made no written reports to respondent concerning his activities in Washington. Petitioner testified that he had heavy expenses but he never understood that respondent was to reimburse him for such expenses (R. 106).

Petitioner made much in his dealings with respondent of his "unique position in dealing with the Government on camouflage matters" (P. Ex. 7, R. 264, 267).

Finally, it should be noted that respondent's appeal to the Court of Appeals challenged the sufficiency of the evidence as to the making and performance of the contract claimed by petitioner (R. 418). The Court of Appeals expressly left those issues open (R. 419).[1] The Court of Appeals decided the case solely on the application of Executive Order 9001 to the contract found by the jury under the District Court's charge. It did not decide or pass upon the additional questions whether the contract as found by the jury was unenforceable under decisions of this Court (R. 421-22) or under a decision of that Court of Appeals dealing with contracts not involving federal functions (R. 422).

V.

Argument

A. Petitioner's position in this Court.

Petitioner's claim in this Court, briefly stated, is that Executive Order 9001 (6 Fed. Reg. 6787) is not a source of public policy to which the Court of Appeals could properly look in holding the contract as found by the jury void and unenforceable (Petition, p. 2, pp. 9-21). Petitioner apparently concedes that if Executive Order 9001 is a source of public policy to which the courts can properly look in determining the enforceability of the contract as found by the jury, his case falls to the ground.

Petitioner makes no claim in this Court that he comes within the exception afforded by Executive Order 9001 to "commissions payable by contractors upon contracts or

[1] If the writ is granted, respondent will argue these issues in additional support of the judgment of the Court of Appeals.

sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business". Nor did he assert this position in the Court of Appeals. Nor, as we shall show (pp. 20-21, *infra*), could he successfully assert it. Much of his argument, however, dwells upon matters which pertain only to the scope of this exception.

We shall demonstrate that the public policy set forth in Executive Order 9001 finds its origin in decisions of this Court; that Congress and the Executive Department have strongly indicated their full approval of that policy, and that the decisions of the state courts relied on by petitioner (Petition, p. 16; cf. p. 12) are not in conflict with the decision of the Court of Appeals.

B. Executive Order 9001 finds its origin in decisions of this Court.

The contract as found by the jury falls clearly under the decisions of this Court dealing with contingent-fee commission arrangements in connection with the purchase of supplies by the United States Government. Respondent contends that these decisions are in themselves sufficient to support the judgment of the Court of Appeals, and they are discussed here to show the sturdy roots of the public policy embodied in Executive Order 9001.

Since the Civil War no agent in the position of petitioner here has been permitted to recover on a contract for contingent-fee commissions on purchases by the United States Government. The vice of the agreement found here, indeed of all such agreements, is that petitioner's compensation is measured by the amount of the sales made and not by the value of the services performed. The fact that

the compensation is dependent upon the success of the venture is a tremendous inducement to the agent to take whatever steps are helpful to secure the desired object, including the use of improper influence upon public officials.

It would, of course, be simple to adopt the rule that only where an agent actually used improper influence in connection with a government contract should he be denied recovery upon a contingent compensation arrangement. But such a rule would ignore the realities of life, for where improper means are employed or improper influence is brought to bear upon public officials to secure government action, it is almost always well concealed. For this reason, this Court has not found it practical to draw any distinction between action upon contracts in the performance of which improper influence was used and those in which it was not.

In *Tool Co.* v. *Norris,* 2 Wall. 45 (1864), suit was brought upon a contingent-fee contract under which the plaintiff was to receive compensation if he succeeded in securing a government contract for the purchase of muskets to be used in the Civil War. This Court held in unequivocal language that the contract sued upon was void as against public policy (2 Wall. at p. 54):

> "* * * All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government * * *. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest * * *.

> "There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements * * *. (2 Wall. at p. 55)
>
> "* * *it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government * * * are void as against public policy *without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.*" (Italics supplied.) (2 Wall. at p. 56.)

This decision was followed in

> *Trist* v. *Child,* 21 Wall. 441 (1874);
> *Meguire* v. *Corwine,* 101 U. S. 108 (1879);
> *Hazelton* v. *Sheckells,* 202 U. S. 71 (1906); and
> *Crocker* v. *United States,* 240 U. S. 74 (1916).

Mr. Justice Holmes delivered the opinion of a unanimous court in *Hazelton* v. *Sheckells, supra,* reaffirming the rule of the *Norris* and *Trist* cases, and saying (202 U. S. at p. 78):

> "The promise to convey did not become binding until the services were rendered, and, when rendered, according to the allegations of the bill they were legitimate. *We assume that they were legitimate,* but the validity of the contract depends on the nature of the original offer, and whatever their form the

tendency of such offers is the same. *The objection to them rests in their tendency, not in what was done in the particular case* * * *. *The court will not inquire what was done.* If that should be improper it probably would be hidden and would not appear. In its inception the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward * * *.

"The general principle was laid down broadly in *Tool Co.* v. *Norris,* 2 Wall. 45, 54, that an agreement for compensation to procure a contract from the Government to furnish its supplies could not be enforced *irrespective of the question whether improper means were contemplated or used for procuring it* * * *." (Italics supplied.)

The *Hazelton* case involved an agreement under which the plaintiff was to attempt to interest Congress in obtaining for the Government, through exercise of its power of eminent domain, certain property belonging to the defendant. If the plaintiff succeeded he would receive as contingent compensation everything which the Government should pay over a certain sum. The agreement was declared void.

Subsequently, in *Crocker* v. *United States,* 240 U. S. 74 (1916), this Court held that a contract providing for contingent compensation and directed at procuring a government order for letter carriers' satchels was void, quoting at length from the opinion in *Tool Co.* v. *Norris,* and also citing *inter alia* the *Trist* and *Meguire* cases.

A clause substantially similar to the warranty contained in Executive Order 9001 was added to government contracts as a direct result of the decision of this Court in the *Crocker* case. See Memorandum of Robert E. Kline,

Special Advisor to the Secretary of the Navy, Hearings before House Committee on Naval Affairs, 77th Cong., 2d Sess., pursuant to H. Res. 162, July 16, 1942, pp. 1185-90. As pointed out in Mr. Kline's memorandum, the warranty against contingent fees has been included in all government contracts since 1918. The purpose of the warranty was not only to embody in all government contracts the doctrine laid down by this Court in the *Crocker* case and its predecessors, so that all contractors with the Government would be on notice that contingent-fee arrangements were illegal, but also to give the Government definite rights in proceeding against contractors who violated the warranty.

The warranty contained in Executive Order 9001 is a reaffirmation by the Executive Department of the Government of its long established policy against contingent-fee arrangements of the kind found in the case at bar.

The fact that the Executive Department expressly accepted this Court's holding in the *Crocker* case and has continued to adhere to the policy therein expressed would render irrelevant petitioner's contention that the rule of the *Crocker* case and its predecessors has been modified. We shall show, however, that the rule of the *Crocker* case and its predecessors has not been modified but has been emphatically reaffirmed by this Court (*infra*, pp. 17-19).

The Courts of Appeals have found Executive Order 9001 to be an expression of public policy against contingent-fee arrangements in connection with contracts to which the United States Government is a party. *Reynolds* v. *Goodwin-Hill Corporation*, 154 F. (2d) 553 (C. A. 2d 1946); *Bradley* v. *American Radiator & Standard San. Corp.*, 159 F. (2d) 39 (C. A. 2d 1947) aff'g 6 F. R. D. 37 (S. D. N. Y.

1946); [2] see also *United States* v. *Paddock*, 178 F. (2d) 394 (C. A. 5th 1949), opinion on rehearing 180 F. (2d) 121 (C. A. 5th 1950), cert. denied, 340 U. S. 813.

In *American Seating Co.* v. *Zell*, 322 U. S. 709 (1944) this Court reversed a judgment of the Court of Appeals and reinstated a judgment of the District Court in favor of the defendant, four members of this Court finding the contingent-fee contract there involved unenforceable by reason of the statute of frauds, and three members of this Court finding the contract void and illegal by reason of the public policy contained in Executive Order 9001 and announced in the *Tool Co.* and *Hazelton* cases. The oral agreement regarding contingent compensation found unenforceable by this Court was kept secret, not as petitioner suggests (Petition, p. 10n), because the parties in fact contemplated that anything improper would be done, but because the parties were in doubt as to the legality of the oral arrangement. See 138 F. (2d) at p. 642. Indeed, it may be pointed out that in the *Zell* case, contact with officials of the United States was not within the contemplation of the parties at all. Recovery was sought in the *Zell* case for commissions earned on contracts which plaintiff obtained for defendant from prime contractors who in turn had contracts with the United States. See 138 F. (2d) at p. 642.

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[2] These decisions are erroneously characterized by petitioner (Petition, p. 16n). In both cases the Court of Appeals applied Executive Order 9001 as a source of public policy. In both cases more than a single government contract was envisaged under the contract passed on by the Court of Appeals. In the *Reynolds* case, the plaintiff obtained but one contract but testified that he attempted to secure several others. In the *Bradley* case, the complaint was dismissed for showing illegality on its face. Plaintiff alleged in his complaint that he succeeded in having defendant included in a list of manufacturers to whom invitations to bid on contracts were sent by the War Department. The complaint is set out in full in 6 F. R. D. 37, 38-39. It alleged that defendant obtained "orders" as a result of plaintiff's activities.

C. Congress has reaffirmed the public policy contained in the warranty clause of Executive Order 9001.

Petitioner seeks to draw from administrative and legislative sources the thought that Executive Order 9001 was not intended to embody a public policy against contingent-fee arrangements.

(1) Stress is laid upon H. R. 7304, 77th Cong., 2nd Sess. (Petition, pp. 17-18). That bill, if enacted, would have gone beyond Executive Order 9001 in three major respects. *First,* it would have made all contingent-fee arrangements illegal. It thus would have nullified the exception in favor of established salesmen contained in Executive Order 9001. *Second,* it would have imposed criminal penalties in connection with contingent-fee arrangements. This sanction was entirely new. *Third,* it would have applied, in its amended form, to all government departments. At the time, Executive Order 9001 applied only to the War and Navy Departments and the Maritime Commission.

The sponsors of the bill were fully aware of Executive Order 9001 and of the holdings of this Court that contracts of the kind found by the jury here could not be enforced by the agent (see 88 Cong. Rec. 6409, 6410, 6413, 6418). The sponsors of the bill, together with the War Department which fully approved it, favored the legislative repeal of the exception in favor of established salesmen maintained by the contractor which is contained in Executive Order 9001. *H. Rep. 2356, 77th Cong., 2d Sess.*

Since petitioner does not here claim that he is within the exception afforded by Executive Order 9001, and since in fact he could not on this record bring himself within it, this piece of legislative history can scarcely help him. It

shows no Congressional disagreement with the warranty clause of Executive Order 9001. On the contrary, it demonstrates that there was a substantial body of Congressional opinion which regarded Executive Order 9001 as entirely too lenient to deal with the situation created by the five-percenters.

(2) Petitioner also argues from Public Law 149, 78th Cong., 1st Sess., 57 Stat. 564 that in some way the public policy announced by Executive Order 9001 was modified. An examination of the statute and the legislative history behind the statute discloses that the contrary was the case.

First, the statute itself was carefully drawn so as to preserve in full vigor the warranty clause contained in Executive Order 9001. The proviso clause in the statute is explicit on this point:

> "*Provided,* that nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions * * *."

It is difficult to see how Congress could have chosen clearer language to express its intent that the warranty in Executive Order 9001 had its full approval.

Second, the legislative history of Public Law 149 discloses that Congress intended to supplement the policy expressed in the warranty clause of Executive Order 9001 in two ways. In the first place, the statute was intended to reach excessive earnings by those who fell within the exception clause of the warranty. And further, the legislation was intended to bring subcontractors within the reach of the renegotiation statute. See *H. Rep. 353, 78th Cong.,*

1st Sess.; Sen. Rep. 255, *78th Cong., 1st Sess.* The committee reports make it abundantly clear that Congress intended to preserve the warranty clause of Executive Order 9001 as an expression of public policy in full force and vigor.

(3) Recent affirmation by Congress of the public policy embodied in the warranty clause of Executive Order 9001 may be found in the statutes cited by petitioner (Petition, pp. 34-5). Both Section 4(a) of the Armed Services Procurement Act of 1947, 62 Stat. 21, 23, 41 U. S. C. (Supp. III) § 153(a),[3] and Section 304(a) of the Federal Property and Administration Services Act of 1949, Public Law 152, June 30, 1949, 81st Cong., 1st Sess., 41 U. S. C. (Supp. III) § 254(a) require the inclusion of a warranty in contracts entered into under those statutes in terms similar to that required in Executive Order 9001. In view of Congress' undoubted knowledge of the history and purpose of the warranty and its relation to the rulings of this Court on contracts violative of the warranty, this surely is striking evidence of the intent of Congress to maintain its rigorous public policy in condemning contracts of the kind presented by the case at bar.

(4) Petitioner also attempts to introduce the thought that administrative agencies have not regarded the warranty clause of Executive Order 9001 as embodying a public policy against contingent-fee arrangements.

However, examination of the cases relied on by petitioner discloses that they involved the question whether the

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[3]While this statute is addressed only to negotiated contracts, its effect is extended by administrative regulation to require inclusion of the warranty in advertised contracts as well. *Armed Services Procurement Regulation,* 7-103:20.

particular person came within the exception clause of the warranty.

Thus, in *North American Iron & Steel Company, Inc.* v. *Navy Department*, Office of Contract Settlement, Feb. 7, 1947, 4 C. C. F. ¶ 60,238, and in *Alloy Products Corporation*, Army Board of Contract Appeals, Oct. 1, 1947, 4 C. C. F. ¶ 60,389, and in an opinion by the Comptroller General, Op. No. B-26993, 22 Comp. Gen. 124, the question before the administrative agency was whether the person claiming the contingent fee was within the exception. In the first two cases, the administrative agency expressly followed the decision of the Court of Appeals in *Reynolds* v. *Goodwin-Hill Corporation*, 154 F. (2d) 553. In the third case the Comptroller General ruled that a licensed real estate broker who had carried on that business for a number of years before the War as a regular occupation came within the exception.

In *United States* v. *Buckley*, 49 F. Supp. 993 (D. C. D. C.) Judge Laws expressly found that the agent there under criminal prosecution came within the exception, stating (49 F. Supp. at p. 995): "Here the broker employed by the contractor was a commercial and a selling agent."

The present position of counsel for the Government may be illustrated by *United States* v. *Paddock*, 178 F. (2d) 394 (C. A. 5th 1949), opinion on rehearing, 180 F. (2d) 121 (C. A. 5th 1950), cert. denied, 340 U. S. 813. There the United States recovered judgment against a corporation which had employed a contingent-fee broker to obtain war contracts for moneys paid by the United States to the defendant representing fees the defendant in turn had paid the broker. The broker was a corporation organized solely for the purpose of soliciting war contracts; its sole com-

pensation was derived from contingent fees, and none of its expenses was paid by the defendant contractor. The Court of Appeals, in holding that the broker did not fall within the exception, said (180 F. (2d) at p. 122):

> "The purpose of this exception, as indicated by the use of the word 'maintained' was to allow contractors to continue the existence of something already in use, not to introduce a special method of securing government contracts. The idea ordinarily conveyed by the phrase 'to maintain' is not to provide or construct something new, but to preserve free from change a method of doing business to which the party has been accustomed."

These authorities in no way help petitioner. He does not claim that he is within the exception prescribed by the warranty clause. On this record such a contention is unavailable to him.

D. The decisions of the State Courts are not in conflict with the decision of the Court of Appeals in this case.

Petitioner contends that there are cases in the state courts contrary to the holding of the Court of Appeals here (Petition, p. 16; cf. p. 12). Examination of these authorities discloses that they are not in conflict with the holding of the court below.

In *Glass* v. *Swimaster Corporation,* 74 N. D. 282, 21 N. W. (2d) 468 (1946), the Supreme Court of North Dakota affirmed a holding by the trial court that a contract to procure a Navy contract on a 5% contingent fee was illegal and unenforceable. In so holding the Supreme Court of North Dakota expressly relied upon Executive Order 9001.

In *Ebeling* v. *Fred J. Swaine Mfg. Co.*, 357 Mo. 549, 209 S. W. (2d) 892 (1948), the Supreme Court of Missouri held valid a contract whereby the agent undertook to procure subcontracts for the defendant from prime contractors who in turn had contracts with the United States. The case did not involve commissions on contracts with the United States.

In *Leahy* v. *Brooklyn Waterfront Terminal Corp.*, 272 App. Div. 781, 69 N. Y. S. (2d) 596 (2d Dept. 1947), the Appellate Division, Second Department of the Supreme Court of New York erroneously held that New York law governed the legality of the contract in suit and under New York law the contract was valid and enforceable. The Court said that if federal law were applied, no different result was required under the facts of the case. This observation was *obiter dictum*, and there must be read in conjunction with the *Leahy* case, the advertent decision of the same court in *John O'Connor* v. *Hudson River Day Line*, 269 App. Div. 960, 58 N. Y. S. (2d) 175 (2d Dept., 1945), aff'd 296 N. Y. 501, 68 N. E. (2d) 450, where the court held that the contract there in suit was governed by federal law and was illegal and void under the decisions of this Court in *Hazelton* v. *Sheckels*, 202 U. S. 71; *U. S.* v. *Allegheny County*, 322 U. S. 174, 183; *American Seating Co.* v. *Zell*, 322 U. S. 709; and *Muschany* v. *United States*, 324 U. S. 49, 64.[4]

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[4] *Bradford* v. *Durkee Marine Products Corp.*, 180 Misc. 1049, 40 N. Y. S. (2d) 448 (Sup. Ct.) held that New York law, not federal law, governed the legality of the contract there in suit. The court was careful to state that it was not considering the federal doctrine or the effect of an application of such doctrine. *Singer* v. *Bruner-Ritter, Inc.*, 180 Misc., 928, 42 N. Y. S. (2d) 881, aff'd 266 App. Div. 953, 44 N. Y. S. (2d) 589 (1st Dept.), leave to appeal denied, 266 App. Div. 993, 45 N. Y. S. (2d) 411 (1st Dept.), follows the *Bradford* case.

Weinstein v. *Palmer,* 226 Minn. 64, 32 N. W. (2d) 154 (1948) did not involve an application of Executive Order 9001, for that was a suit for a contingent-fee by an attorney in connection with his representation of his client in an OPA proceeding.

Nor did *Hall* v. *Anderson,* 18 Wash. (2d) 625, 140 P. (2d) 266 (1943) involve Executive Order 9001. The court there held that Washington law governed the validity of contract whereby an attorney was hired to render professional services on a contingent-fee basis.

As has already been pointed out, in *United States* v. *Buckley,* 49 F. Supp. 993, the question was whether the agent there under criminal prosecution came within the exception clause in Executive Order 9001.

E. The public policy announced by this Court in Tool Co. v. Norris, supra, is the rule of this Court today.

As recently as 1945, this Court has announced its adherence to the wise rule of public policy laid down by it in the *Tool Co., Hazelton* and *Crocker* cases. In *Muschany v. United States,* 324 U. S. 49, 64 (1945), this Court said: "Contingent fee contracts to secure government business for the employer of the recipient have been held invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure." This Court carefully distinguished the situation before it—the Government's employment of an agent to contract on its behalf—from the situation presented in the case at bar. 324 U. S. at p. 65. See also *American Seating Co.* v. *Zell,* 322 U. S. 709 (1944).

The cases relied on by petitioner are in no way to the contrary (Petition, p. 9, 21-23).

Steele v. *Drummond,* 275 U. S. 199 (1927) involved a contract, one of the terms of which contemplated securing a franchise for a railroad from a Florida municipality. The suit was brought to recover moneys actually expended in the performance of the contract. No contract with the United States was involved; nor was a contingent fee present. A contingent-fee contract is, we submit, squarely within Mr. Justice Butler's dictum (275 U. S. at p. 206) regarding "other improper or corrupt means."

Valdes v. *Larrinaga,* 233 U. S. 705 (1914) involved a contract for professional services rendered by an engineer in preparation of plans and claims relating to riparian rights. The compensation sought to be recovered was stated as 10% of *net profits.* Mr. Justice Holmes specifically stated that the case was decided on the assumption that *Hazelton* v. *Sheckells,* 202 U. S. 71, and like decisions were good law, absent controlling authorities laid down by Porto Rico (233 U. S. at p. 709).

Winton v. *Amos,* 255 U. S. 373 (1921) was a suit by attorneys in quantum meruit for services rendered in recovering a fund for Indians from the United States. No contingent fees were involved; the measure of recovery was the value of the services legitimately rendered—an element lacking in the contingent-fee cases.

In *Oscanyan* v. *Arms Co.,* 103 U. S. 261 (1880) this Court held that a contract for contingent fees on sales made to the Turkish government was illegal and void. No contract with the United States Government was involved. The language used by this Court in *Tool Co.* v. *Norris,*

supra, was quoted by Mr. Justice Field with express approval (103 U. S. at pp. 273-4). In addition, it may be pointed out that the exception contained in the warranty clause of Executive Order 9001 may be grounded upon the language in the *Oscanyan* case with respect to compensation paid to "merchants for legitimate services in the regular course of business." Since petitioner is not within the exception, it is difficult to see how this language affords him any comfort.

Stanton v. *Embrey, Administrator,* 93 U. S. 548 (1876) involved a claim by an attorney for a contingent-fee for professional services rendered. This Court took occasion specifically to approve the rule laid down in the *Tool Co.* case (93 U. S. at p. 557), but it put to one side contracts involving the services of lawyers in preparing and arguing claims against the United States, on the ground that the two situations involved basically different considerations. It should be noted that while compensation was contingent, recovery was based on quantum meruit.

In sum, the rule laid down by the *Tool Co., Hazelton* and *Crocker* cases has not been modified in any way by this Court. These decisions represent the sound rule of public policy as indeed they did in 1865.

With this demonstration both of petitioner's principal arguments collapse. The warranty clause of Executive Order 9001 represents a public policy specifically approved by all the branches of the Government, by Congress, by the Executive and by this Court. Quite independently of Executive Order 9001 the decisions of this Court furnish ample basis for the determination of the Court of Appeals that the contract as found by the jury is void and unenforceable.

F. Petitioner is not within the exception clause of Executive Order 9001 relating to "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business".

Neither in this Court nor in the Court below has petitioner asserted that he comes within the exception provided by Executive Order 9001 relating to established sales agencies. Petitioner has consistently maintained the position that Executive Order 9001 has no application to this case.

It is apparent that petitioner's argument in this Court proceeds upon the inarticulate premise that petitioner is entitled to the benefits of the exception—even though he makes no showing that he falls within it.

The Court of Appeals for the Second Circuit has pointed out in two cases that the exception clause is an Executive relaxation of the rule announced by this Court in the *Tool Co.* case and the cases which follow that case. *Reynolds* v. *Goodwin-Hill Corporation,* 154 F. (2d) 553 (C. C. A. 2d, 1946); *Bradley* v. *American Radiator & Standard San.* Corp., 159 F. (2d) 39 (C. A. 2d, 1947). As the Court of Appeals said in the *Bradley* case (159 F. (2d) at pp. 40-1):

> "The exception creates a privileged class who may receive contingent fees for securing government contracts, while others may not. Not only should grants of special privileges be jealously restricted, but such a restriction is also in the interest of maintaining the integrity of governmental contracting procedure."

Under the rules adopted by the administrative agencies charged with the enforcement of the warranty clause in Executive Order 9001, petitioner clearly fails to bring himself within the exception. As reported by the Admin-

istrative agencies to Congress, a person to qualify within the exception had to meet three tests. *First,* such person must have had a continuity of service going well back before the war. *Second,* such person must have represented his principal in selling to commercial firms as well as to the Government. *Third,* such person must have been employed because of his familiarity with the product sold, not because of his knowledge of government procedure or acquaintance with government officials. See *H. Rep. 353, 78th Cong., 2d. Sess.,* pp. 5-6. Petitioner fails to meet all three of these tests.

Petitioner is not a salesman—not even for his own organization (R. 103). Nor was his own business organization a sales organization (R. 21, 25). Petitioner was not therefore a commercial or selling agency for the purpose of securing business.

Petitioner's claim dates from January 5, 1942. He bore all of his own expenses, and petitioner does not claim here reimbursement for expenses (R. 106). His relationship with respondent smacked wholly of a wartime character, and his compensation was to be wholly contingent.

Petitioner had no knowledge of the product that respondent furnished to the United States (R. 151, 108, 110, 146-47). All of his claimed performance took place in Washington making contact with government officials.

C. Reasons for Denying the Writ.

The Court of Appeals correctly applied Executive Order 9001 to the contract found by the jury under the District Court's charge. Executive Order 9001 is but one application by the Executive Department of a rule of public policy

that finds its roots in the decisions of this Court which go back to the Civil War. No conflict with decisions of this Court or of the state courts has been demonstrated; no conflict of decisions in the Courts of Appeals is asserted.

Executive Order 9001 is no longer in effect. The case at bar related solely to the relationship of the parties during World War II. No other question is presented.

The writ should be denied.

Respectfully submitted,

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